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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUL - 5 1995

In re Applications of) MM DOCKET NO. 95-135
)
THE PETROLEUM V. NASBY CORPORATION) File No. BRH-890601VB
)
For renewal of Station WSWR(FM))
Shelby, OH)
)
THE PETROLEUM V. NASBY CORPORATION) File No. BTCH-921019HX
) File No. BTCH-921019HY
For transfer of control of Station)
WSWR(FM), Shelby, OH)

TO: The Review Board

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PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

Pursuant to §§ 1.4(b), 1.102(a), and 1.106 of the Commission's Rules, The Petroleum V. Nasby Corporation (Nasby), licensee of Station WSWR(FM) at Shelby, Ohio, by its counsel, hereby petitions the Review Board to reconsider and/or clarify its *Decision*, FCC 95R-11, released June 5, 1995 in the above-referenced proceeding.

Background

In its *Decision*, the Review Board affirmed the renewal of Station WSWR(FM), which renewal was previously granted by the Honorable Edward Luton (presiding ALJ) in an *Initial Decision of Administrative Law Judge Edward Luton*, 9 FCC Rcd. 6072 (ALJ 1994) (I.D.). The Review Board, however, has conditioned its affirmance by affixing a specific divestiture condition to the approval of the renewal and transfer of control applications. *Decision*, ¶ 3, slip op. at 1. These conditions are (1) that the stock held individually by Kathy G. Root (33 shares) and the stock held in trust for the benefit of Thomas L. and Kathy G. Root's children (150 shares) be divested within 60 days from the release of the

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Decision to "unrelated buyers;," (2) that the 70.25 shares of stock held by Joanne L. and Thomas F. Root, JTWROS, which is the subject of the proposed transfer to Ginsburg, Feldman & Bress, Chartered, be divested within 60 days from the release of the *Decision* to "unrelated buyers;" and (3) that Joanne L. Root resign her membership on the Nasby Board and her position as corporate Secretary of Nasby, also within 60 days of the release of the *Decision*. *Decision*, ¶ 25-26, *slip op.* at 5. The Board has stated that this action is necessary to "provide the Commission with adequate assurance that WSWR(FM) will not again be subjected to public scrutiny to determine the potential impact of Mr. Root's presence." *Decision*, ¶ 24, *slip op.* at 5.

For the reasons set forth below, Nasby petitions the Board to reconsider and/or clarify certain aspects of its *Decision*, as it believes the Board's action is not supported by the record and imposes an undue burden on the parties affected by the Board's decision.

(1) ***Proposed Stock Divestiture of Kathy G. Root and Root minor children.*** The Board states that it was not embarking on a *sua sponte* review of the presiding ALJ's determination that the stock transfers were not accompanied by misrepresentation, and therefore did not require the removal of Nasby's license. *Decision*, ¶ 22, *slip op.* at 4. Yet, the Board appears to have, *sua sponte*, done precisely that. The Board acknowledges that neither the Bureau nor Nasby took exception to the *I.D.* (*Id.*) nor did the Bureau challenge the record evidence on this score. The Board

nonetheless imposed certain conditions on Nasby's license renewal, notwithstanding its determination that Nasby is qualified to remain a Commission licensee, because it believes that the stock transfers facilitated the removal of Thomas L. Root from ownership in Nasby by placing the stock in family members. Implicit in this conclusion is the Board's apparent determination that Thomas L. Root has potential influence in connection with these shares.

The Board's divestiture order places undue hardship on Nasby and the parties affected by its divestiture order. As the record evidence established, Station WSWR(FM) is a 3 kw FM radio station in Shelby, Ohio, which has been a marginal operation at best. Nasby Ex. 1, p. 1; Nasby Appendix C (Income and Balance Statements). It is not in a financial position to purchase the stock, even assuming such purchase would be permitted by the Board's order and there is no secondary market in which to sell less than controlling interest in a station the size of WSWR(FM). This is not an FM radio station located in New York City where the cash flow may be such that individuals exist who may be interested in purchasing less than a controlling interest. Moreover, even assuming that prospective purchasers of the stock can be located, 60 days is not sufficient time within which to attempt to locate such purchasers, negotiate the proposed sale and draft documents for execution and submission to the FCC for approval.

The forced divestiture is tantamount to a forced sale of the entire small market FM radio station under conditions which are not in the station's best interest, even assuming the other Nasby

shareholders were interested and could in fact locate a suitable buyer. Factoring in the time to attempt to locate a suitable buyer, negotiating such sale, drafting and execution of appropriate sales documents, then seeking FCC approval, runs Nasby smack into its next renewal period. Moreover, Nasby and its station have expended considerable resources to retain its qualifications to remain a Commission licensee. A forced "fire" sale is not the reward it seeks for having its operations scrutinized for over three years on matters beyond its control.

Without conceding the propriety of the Board's divestiture requirements, in an effort to bring this proceeding to an earlier conclusion and to conserve the resources of the Commission and Nasby, Nasby petitions the Board to reconsider its divestiture requirement and consider instead the establishment of a new trust to hold title to the shares of stock currently held by Kathy G. Root individually, and in trust for her children, and the appointment of an independent trustee. Attached hereto as Appendix A is a Statement of Intent to Form a New Trust to Hold Title to Certain Shares of Stock in the Petroleum V. Nasby Corporation executed by Kathy G. Root, individually and as Custodian under the Uniform Gift to Minors Act (UGMA), and Arlene M. Geer, Trustee. The Statement provides that a new trust would be formed which would place control of the trust (which would include all the Nasby stock shares at issue) **irrevocably** in the hands of an independent trustee. All legal voting control would be placed in the independent trustee, consistent with Commission rules and policies

which encourage the facilitation of trusts. In the *Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensees (Corporate Attribution Order)*, 55 R.R. 2d 1465, 1485-86 (1984), recon. in part, 58 R.R. 2d 604 (1985). The Statement further indicates that the trust would include all other safeguards established by the Commission (see *Corporate Attribution Order, supra*), including, *inter alia*, that no beneficiary and no other person will be empowered to replace the trustee or direct the trustee in the discharge of his duties, the trustee will be prohibited from selling the stock to any beneficiary, to Thomas L. Root, or to any member of his family, the trustee will be prohibited from providing any information to any beneficiary relating to the operation, management or financial condition of Nasby, and the like.

Moreover, the trust would be prepared for submission as an amendment or modification to the existing transfer of control application File No. BTCH-921019HX, and would be subject to the review and approval of the Mass Media Bureau as directed by the Board at fn. 12 of its *Decision (slip op. at 5)*.¹ This option is considerably less draconian than the Board's divestiture order yet it would accomplish the same goals -- removal of any potential presence of Thomas L. Root. Transfer of the stock at a later date

¹ If the Board favorably considers Nasby's alternative to divestiture as directed by the Board, it is requested that the Board permit the modification of the first transfer of control application (File No. BTCH-931019HX) without the need of assigning a new file number. Nasby understands that the Mass Media Bureau may require that the proposed modification be placed on public notice for comment relative to Mr. Stoll's qualifications.

subject to the provisions of the trust and prior Commission approval, or an asset sale of the station at a later date, will provide a more orderly and efficient means of compensation for the stock, which the Board has not precluded in its order of divestiture.

(2) **Transfer of 70.25 shares to Ginsburg, Feldman & Bress, Chartered.** In its *Decision* at ¶ 25, slip op. at 5, the Review Board granted two transfer of control applications, including FCC File No. BTCH-921019HY. That application proposes to transfer 70.25 shares of Nasby stock from Joanne L. and Thomas F. Root, JTWROS to the law firm of Ginsburg, Feldman & Bress, Chartered, in satisfaction of a stock pledge agreement between the parties relating to legal fees incurred by the law firm on behalf of Thomas L. Root. Jnt. Stip. 3-5, Nasby Exs. 4 ,5; Bur. Ex. 11. At ¶ 26 (p. 5) of its *Decision*, the Board ordered that the grant of the applications for renewal and transfer of control of Station WSWR(FM) be conditioned, *inter alia*, upon "the sale of 70.25 shares held by Thomas F. and Joanne Root that are the subject of the proposed transfer to Ginsburg, Feldman & Bress, to unrelated buyers." Nasby seeks the Board's clarification with respect to this divestiture requirement. At first blush the Board's grant of the transfer of control application to which Ginsburg, Feldman & Bress, Chartered is a party would permit Joanne L. and Thomas F. Root to comply with their proposed transfer to Ginsburg, Feldman & Bress, Chartered of the 70.25 shares which are the subject of the stock pledge agreement. In reading the ordering clause at ¶ 26,

however, Nasby was uncertain as to whether the Review Board was contemplating something else since it did not explicitly indicate that the proposed transfer to Ginsburg, Feldman & Bress, Chartered which the Board approved in the previous paragraph would satisfy the Board's requirement set forth at ¶ 26. Since Ginsburg, Feldman & Bress, Chartered is not in any way related to Joanne L. and Thomas F. Root, it is the intention of Nasby to effectuate the proposed transfer to Ginsburg, Feldman & Bress, Chartered unless the Board states otherwise.

(3) ***Forced divestiture of Joanne L. Root's membership on the Nasby Board of Directors and as Nasby's corporate Secretary***

At ¶ 24 (p. 5) of its *Decision*, the Board calls for the forced resignation of Joanne L. Root, mother of Thomas L. Root, as a member of the three-person Nasby Board and as corporate Secretary of Nasby. The Board's decision is apparently based on its characterization that Joanne L. Root "succeeded" Thomas L. Root to these positions, and its further implication that this "succession" necessarily arouses suspicion concerning "the potential impact of Mr. Root's presence." *Id.* While it is true that Joanne L. Root was elected to serve as a member of the Nasby Board and as corporate Secretary of Nasby subsequent to Thomas L. Root's resignation, there is no evidence in the record to support the Board's view and correspondent negative implication that Joanne L. Root succeeded Thomas L. Root as a member of the Board and as corporate Secretary in anything but a duly authorized election in which Thomas L. Root took no part.

Nor is there is any evidence, record or otherwise, that Joanne L. Root's election to the Nasby Board and as the corporate Secretary of Nasby was so that the interests of Thomas L. Root, conceivably advanced by virtue of his children's beneficial stock ownership and his spouse's stock ownership, would take precedence over the interests of the numerous other Nasby shareholders. ² As one of three Nasby Board members and as corporate Secretary, Joanne L. Root has a fiduciary duty to Nasby and all of its shareholder, and there is no evidence, record or otherwise, to suggest let alone establish, that Joanne L. Root has done anything but act in the best interests of Nasby. The Board's condition forcing Joanne L. Root to resign as a director and as corporate Secretary is grossly unfair especially where the Board acknowledges

² Nor should the Board presume that Joanne L. Root, as the mother of Thomas L. Root, was, or is, predisposed to place his interests above all other Nasby shareholders. Thomas L. Root is an adult who engaged in misconduct for which he exclusively was punished. Thomas L. Root's misconduct is a matter of record in this proceeding and such misconduct did not in any way implicate the Station or Nasby officers, directors or shareholders, including Joanne L. Root. If it did, the presiding ALJ and the Board would have no doubt taken this into consideration before it determined that Nasby was qualified to remain a Commission licensee. See, e.g., *Decision*, ¶¶ 18-19, *slip. op.* at 3-4. Indeed, even under the Commission's own attribution rules, the Commission looks to the specific facts and circumstances presented before it reaches a determination that there is the requisite degree of independence in the interests of family members. *Spousal Attribution Policy*, 70 R.R.2d 768, 771 (¶ 16) (1992). Here, the Commission and the Bureau at the outset have been aware that Joanne L. Root is the mother of Thomas L. Root. The Bureau served numerous interrogatories and document requests on Nasby and declined to take depositions of Nasby principals, despite the undersigned's offer to make the principals available. If there was a concern that Joanne L. Root was not acting in a proper manner, the Bureau should have pursued this matter in discovery and hearing. It did not and the time for such opportunity has long passed.

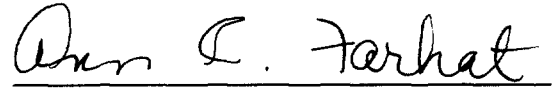
that the stock interests held by Joanne L. Root and her spouse, Thomas F. Root, are not affected by its *Decision*. See *Decision*, fn. 11, *slip op.* at 5.

Joanne L. Root has been a shareholder of Nasby since its inception over 12 years ago when the station commenced operations [CITE], and if the other Nasby shareholders, most of whom live in the several communities Station WSWR(FM) serves, have placed their trust and confidence in Joanne L. Root to act in their best interests, it is inappropriate and grossly unfair for the Board to substitute its judgment and arbitrarily conclude that the forced resignations will somehow provide "adequate assurance that WSWR(FM) will not again be subjected to public scrutiny to determine the potential impact of Mr. Root's presence." The fact is the record evidence already establishes that Station WSWR(FM)'s day-to-day management, operation and control has always and continues to rest with the station's General Manager, first David L. Williamson, and since November 1988, Timothy J. Moore. *Decision*, ¶ 19, *slip op.* at 4. The Board's calling for the forced resignations of Joanne L. Root implies wrongdoing on her part which is not supported by the record or otherwise. Accordingly, Nasby hereby requests that the Board reconsider its decision ordering the resignations of Joanne L. Root as a director and as corporate Secretary of Nasby.

Accordingly, for the reasons stated above, The Petroleum V. Nasby Corporation respectfully requests that the Review Board reconsider and/or clarify its *Decision* released in this proceeding, as requested herein.

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Respectfully submitted,

A handwritten signature in cursive script, reading "Ann C. Farhat". The signature is written in dark ink and is positioned above a horizontal line.

Ann C. Farhat

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Counsel for The Petroleum
V. Nasby Corporation

July 5, 1995

Appendix A

**STATEMENT OF INTENT TO FORM A NEW TRUST
TO HOLD TITLE TO CERTAIN SHARES OF STOCK
IN THE PETROLEUM V. NASBY CORPORATION**

A trust (hereinafter "Newtrust") will be established under Ohio law for the purpose of holding 33 shares of voting common stock in The Petroleum V. Nasby Corporation, licensee of commercial FM broadcast station WSWR, Shelby, Ohio (hereinafter "Stock") now being held by Kathy G. Root; 50 shares of Stock now being held by Kathy G. Root as custodian under the *Uniform Gifts to Minors Act* for Thomas P.J. Root and Leslie J.L. Root; and 100 shares of Stock now being held by Arlene M. Geer as trustee for Thomas P.J. Root, Leslie J.L. Root and Travis S.C. Root.

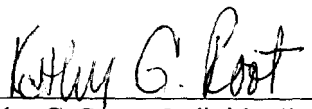
Newtrust will be administered by a single trustee, Thomas J. Stoll, Esq., of counsel to the firm Richard S. Lynch Co., L.P.A., Norwalk, Ohio. Mr. Stoll is an attorney in private practice in Norwalk, Ohio, and (1) is not related to Thomas L. Root, Kathy G. Root or Arlene M. Geer; (2) does not now nor has he ever held an attributable interest in a licensee, permittee or applicant before the Federal Communications Commission; nor (3) has he ever represented, contracted with or employed Thomas L. Root, Kathy G. Root, Arlene M. Geer, or any other member of the family of Thomas L. Root.

The trust agreement establishing Newtrust will be submitted to the Federal Communications Commission within thirty (30) days of the date the Commission grants reconsideration of the *Decision* issued June 5, 1995, as part of an amendment to the pending *Application for Consent to Transfer of Control*, and will include at minimum the following terms:

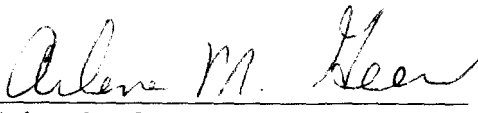
- The trust will be irrevocable.
- The beneficiaries of the trust will be Kathy G. Root, Thomas P.J. Root, Leslie J.L. Root and Travis S.C. Root.
- None of the beneficiaries and no other person will be empowered to replace the trustee or direct the trustee in the discharge of his duties.
- The corpus of Newtrust will include 183 shares of voting common stock in The Petroleum V. Nasby Corporation (hereinafter "Stock"), with all voting rights being vested in the trustee, as well as such other assets as the settlors may elect to place in trust.
- No person other than the trustee may exercise voting rights over the Stock without prior Federal Communications Commission approval.
- The trustee is prohibited from selling any of the Stock to any beneficiary, to Thomas L. Root, or to any other member of the immediate family of Thomas L. Root. The trustee may sell the stock only pursuant to prior grant of an application for transfer of control by the Federal Communications Commission.
- The Trustee is prohibited from providing any information to any beneficiary relating to the operation, management or financial condition of The Petroleum V. Nasby Corporation which he may acquire pursuant to discharge of his duties as Trustee.
- The Trustee shall select any replacement trustee without the participation of or consultation with any beneficiary or Thomas L. Root or any other member of the immediate family of Thomas L. Root.
- The Trust shall not terminate until the earlier of the time (1) it no longer possesses any legal or beneficial ownership in any securities of The Petroleum V. Nasby Corporation; or (2) The Petroleum V. Nasby Corporation is no longer a licensee, permittee or applicant before the Federal Communications Commission.
- The Trust shall contain such other terms as are necessary to ensure that none of the beneficiaries can be deemed to have an attributable ownership interest in The Petroleum V. Nasby Corporation under Federal Communications Commission rules and policies.

Kathy G. Root and Arlene M. Geer have received advice of their legal counsel, George C. Ford, Esq., Norwalk, Ohio, that Ohio law permits the conveyance of Stock now held pursuant to the *Uniform Gift to Minors Act* and in trust to Newtrust after its formation, and by their execution of this *Statement of Intent*, express their willingness to cause conveyance of all of the shares of Stock in which they have legal or beneficial interest to Newtrust in accordance with the statements set out herein.

July 3, 1995


Kathy G. Root, Individually, and as
Custodian under *UGMA*

July 3, 1995


Arlene M. Geer, Trustee

CERTIFICATE OF SERVICE

Ann C. Farhat, a member of the firm of Bechtel & Cole Chartered, certifies that on July 5, 1995, she caused copies of the foregoing *Petition for Reconsideration and/or Clarification* to be served by hand (or by U.S. first class mail, postage prepaid) on the following individuals:

The Honorable Joseph A. Marino (by hand)
Chairman
The Review Board
Federal Communications Commission
2000 L Street, N.W., Room 211
Washington, D.C. 20554

The Honorable Marjorie R. Greene (by hand)
Member
The Review Board
Federal Communications Commission
2000 L Street, N.W., Room 206
Washington, D.C. 20554

Allan Sacks, Chief for Law (by hand)
Leland J. Blair, Assistant Chief for Law
The Review Board
2000 L Street, N.W., Room 205
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James Shook, Esquire (by first class mail)
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Ann C. Farhat